

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING**

76-6125

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-6125

JOSEPH P. ORNATO,

Plaintiff-Appellant,

-against-

MARTIN HOFFMAN, SECRETARY OF THE ARMY
and COMMANDING OFFICER, RESERVE COMPO-
NENTS PERSONNEL,

Defendants-Appellees.

PETITION FOR RE-HEARING

Steven J. Hyman
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Appellant petitions this Court for re-hearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure from the opinion of the Court filed December 2, 1976, affirming the order and judgment of the District Court. It is submitted that, as set forth below, the opinion of the Court of Appeals misapprehended or otherwise overlooked certain points of law that warrant reconsideration by the Court.

POINT I

THE COURT'S OPINION MISCONSTRUED
THE APPLICABLE REGULATION

The decision of the Court construes AR 601-25 in a manner inconsistent with that given it by the United States Army and the United States Attorney representing appellees. The Court's opinion states, at p. 770 of the slip opinion, that: "... the Army sets no standards for the granting of exemption, but sets standards for the granting of delay, as shown in the margin. [fn. omitted]" Again, further on in the opinion, the Court makes reference to the apparent differences between the criteria set down for delay and those set down for exemption (see p. 774 of the slip opinion). These references are, in part, the rationale for refusing to review the Army's denial of petitioner's application for delay and/or exemption from active duty, yet the distinction is not correct and is inconsistent with the interpretation accorded the regulation by both the U.S. Attorney and the Army, itself.

The U.S. Attorney, in the brief filed with this Court and with the District Court, concedes that the same criterion is applicable for exemption as well as delay (see defendants appellees' brief, p. 4-5). As the U.S. Attorney

states in his brief:

"Such requests for delay or exemption from active duty by Berry Plan participants are governed by the provisions of Army Regulation 601-25. ^{*/} [fn. omitted] The specific criteria for establishing community hardship are set forth in ¶2-19 of AR 601-25. ^{**/}

^{**/} Although the introductory language refers only to requests for delay, the Army has treated the regulation as permitting exemptions as well. See AR 601-25 ¶2-20."

(Page 4, Appellees' Brief)

The government's brief goes on to set forth the documentation needed "to seek an exemption ... " (Id., at p. 5) noting that "there is the added requirement where only a delay is sought of showing the expected date that a replacement will be available." (Id.)

The interpretation of the regulation by the U.S. Army comports with the view set forth by the U.S. Attorney. In a letter to Dr. Ornato which is part of the original record herein but inadvertently omitted from the Appendix, the Department of the Army states:

"The Department of the Army utilizes all of the following criteria in reviewing requests for delay or exemption from active duty based upon alleged community hardship or community essentiality "[setting forth the criteria contained in AR 601-25, ¶2-19a].

(See letter dated March 5, 1976, from Major Linden Schuyler to Capt. Joseph Ornato, annexed hereto as Exhibit "A")

Thus, the criteria, according to the Army, is the same whether it be for exemption or delay.

The distinguishing feature between delay and exemption is whether or not the individual applying for the status can be replaced within a six-months period. (See Appellees' Brief, p. 5 and AR 601-25 ¶2-20). The framers of the regulation did not intend that there be no standard or criteria for evaluating exemption by reason of community hardship. Delay and exemption are measured by the same standard except with regard to number (4) of AR 601-25 ¶2-19a. It is this section which will govern whether or not the action taken by the Board of Officers should be for delay or for exemption. See ¶2-20, 2-22. In fact the regulation at ¶4-3 provides for exemption "when information and/or documentary evidence reveals that total relief from the requirement to report for AD/ADT is applicable, the member will be granted an exemption and process in accordance with AR 135-133."

The Army implemented the regulation with regard to Dr. Ornato in a manner consistent with the interpretation that the criteria set down in ¶2-19a governs exemption and delay. The opinion rendered by the Board was to deny delay and exemption on the grounds that Dr. Ornato could be replaced and therefore was not essential. The real impact of the Court of Appeals' opinion is to create a situation that can only be likened to that described by Yossarian in Joseph Heller's "Catch 22":

"There was only one catch and that was Catch 22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch 22 and let out a respectful whistle."

[at p. 47]

By distinguishing between delay and exemption, as this Court's opinion seems to indicate, the same type of circle of confusion is created. If New York Hospital could show that it had a replacement available within six months, then according to the opinion of the Court, mandamus would be an appropriate remedy to order compliance by the Army with the terms of its own regulations. Yet if a replacement were so available, then the Army would be correct that Dr. Ornato could be replaced by New York Hospital and therefore the Hospital did not meet the criteria required by the regulation to show community hardship essentiality. On the other hand, if New York Hospital can document that Dr. Ornato cannot be replaced within six months, then essentiality

is established but no relief is available because under this distorted construction of the regulation the inability to replace appellant defeats the right for a delay. Thus New York Hospital and the community will suffer because appellant has proved his case too well. He has established essentiality by showing the extreme difficulty in replaceability and by doing so has ensured his induction into the Army. The more desperate the community would be for Dr. Ornato and the more unique his service, the Court seems to indicate, the less he can qualify under the regulation. As Justice Cardozo once stated:

"Rights and duties in systems of living law are not built upon such quicksands."

Hynes v. New York Central Railroad,
231 N.Y. 229 (1921)

The proper rationale in construing the regulation will prevent this circuitous reasoning. As the Army, the U.S. Attorney and appellant contended, the proper reading of the regulation is that the same criteria apply for delay and exemption, the only distinction between them being whether or not a replacement is reasonably available. Under such a view, the rationale that review is not necessarily barred where delay is concerned (see p. 776, slip opinion) is equally applicable to exemption.

It must be emphasized that this Court has held that appellant does not come within the terms of the criteria for delay from active duty because the Hospital has not shown that

he can be replaced within six months. However, the Army denied his application because they found that "he could be replaced." (See A53-56).

In view of the problems caused by this Court's opinion in construing the Army regulation, it is submitted that re-hearing should be set so that the matter may be properly briefed and considered by this Court. This Court has long noted that the interpretation by the Service of its regulations should be given great weight (see Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968)). As argued above, it is submitted that the Army uses the same regulation for consideration of delay and exemption, the only distinction being whether or not the individual is replaceable within a six-month period. At the very least, re-argument should be given to determine whether or not the matter should be remanded to the District Court so that a hearing may be had with regard to this issue.

POINT II

THE COURT'S OPINION HAS OVERLOOKED REVIEWABILITY OF ANY ACTION WHERE THERE IS ARBITRARY OR IRRATIONAL DECISIONS

In Roth v. Laird, 446 F.2d 855 (2d Cir. 1971), Casarino v. United States, 431 F. 2d 775 (2d Cir. 1970) and Nixon v. Secretary of the Navy, 422 F. 2d 940 (2d Cir. 1970), this Court has long noted that where there is arbitrary and irrational conduct

on the part of an agency, the Court has the jurisdiction to review and rectify such action. Yet nowhere in the Court's opinion in the case at bar has it acknowledged such reviewability nor has it considered the rationality of the action of the Army with regard to appellant's application.

Consideration of this issue is all the more critical in the case at bar because as this Court has already noted, the Army decision to deny appellant's application is not based on balancing of Army needs versus community needs nor upon military necessity. Thus the action of the Army is reviewable to the extent of determining whether or not the regulations it has enacted and the action taken pursuant to them has met the standard of rational and non-arbitrary conduct.

WHEREFORE, it is respectfully requested that a rehearing of the within case be granted or that such other and further relief be granted as this Court may determine.

Respectfully submitted,

KUNSTLER & HYMAN
Attorneys for Appellant
370 Lexington Ave.
New York, New York 10017

Of counsel:

Steven J. Hyman

December 15, 1976



DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
U. S. ARMY RESERVE COMPONENTS PERSONNEL AND ADMINISTRATION CENTER
ST. LOUIS, MISSOURI 63132

IN REPLY REFER TO:

AGUZ-PAD-DO Ornato, Joseph P.
041 40 2836

5 MAR 1976

SUBJECT: Delay and/or Discharge

CPT Joseph P. Ornato
1101 Midland Avenue Apt 323
Bronxville, NY 10708



1. This is in reference to your letter of 9 February 1976 with inclosures requesting discharge or delay from active duty based upon alleged community hardship.
2. You voluntarily accepted an appointment as First Lieutenant, Medical Corps, United States Army Reserve on 5 November 1971 under the provisions of the Armed Forces Physicians' Appointment and Residency Consideration Program (Berry Plan). You were authorized on delay from active duty until 30 June 1976 to complete residency training in cardiology.
3. Upon your voluntary acceptance of commission and delay under the above medical procurement program, you agreed to serve two (2) on active duty, if required upon completion of your professional training or withdrawal therefrom. There is no contractual provision under the Berry Plan whereby you may be released from your active duty obligation in order to enter private practice unless you are declared excess to active Army requirements or a valid hardship is substantiated.
4. At this time you are not excess to active Army requirements as a critical shortage of physicians with your professional education and training does exist. Therefore, your request for discharge is not favorably considered. The information submitted does not substantiate a valid hardship condition and is insufficient for the Department of the Army Delay and Exemption Board to make a valid determination.

Exhibit A

AGUZ-PAD-DO Ornato, Joseph P.
041 40 2836
SUBJECT: Delay and/or Discharge

5 MAR 1975

5. The Department of the Army utilizes all of the following criteria in reviewing requests for delay or exemption from active duty based upon alleged community hardship or community essentiality:

- a. The service performed by the officer is essential to the maintenance of health, safety, or welfare of his community.
- b. The service cannot be performed by other persons residing in the area concerned.
- c. Prior to the date scheduled to report for active duty the officer cannot be replaced in the community by another person who can perform such services.
- d. There is reasonable assurance that the officer can be replaced in the community within the authorized period of delay.

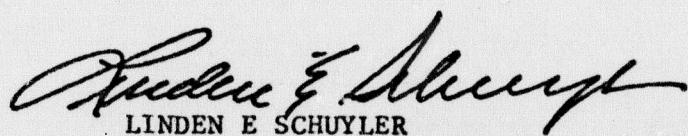
Personal appearance before the Army Delay and Exemption Board is not authorized.

6. The documentation needed to substantiate such a request must include:

- a. A statement from the State Professional Association showing the number of personnel in the area with similar qualifications, or who can perform the same or similar service.
- b. Letters from at least five (5) disinterested persons indicating how the officer's withdrawal from the community would affect its health, safety, or welfare.
- c. The action taken to obtain replacements.

7. The letters you have submitted will be considered as part of the requirements mentioned above should you decide to follow through with a request for community hardship.

FOR THE COMMANDER:


LINDEN E SCHUYLER
MAJ, GS
Chief, Delayed Officer Branch, PAD

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK }
COUNTY OF New York } SS.:

Patricia Mazza
being duly sworn, deposes and says; that deponent
is not a party to the action, is over 18 years of age
and resides at Brooklyn, N.Y.
That on the 16th day of December 1976
deponent served the within Petition for
Rehearing upon

The U.S. Attorney for Southern District
N.Y.
attorney(s) for Appellees

in this action, at 1st Andrews Plaza
N.Y., N.Y.
the address designated by said attorney(s) for that
purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in a
post office - official depository under the
exclusive care and custody of the United States post
office department within New York State.

Patricia Mazza

Sworn to before me,

this 16 day of December 1976

STEVEN J. HORWITZ
Notary Public, State of New York
No. 3070237
Qualified in New York
Commission Expires 12/28/78